160 U.S. 259

TRANSCRIPT OF RECORD.

160—259

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~1201~~. 701

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

BERNARD KEEGAN.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 2, 1894.

(15,585.)

(15,585.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1201.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

BERNARD KEEGAN.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 24, 1894.

1 U. S. Circuit Court of Appeals for the Second Circuit.

APRIL 20, 1894.

Present: Hon. William J. Wallace and Hon. E. Henry Lacombe, circuit judges, holding said court.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plaintiff in Error,
vs.
BERNARD KEEGAN, Defendant in Error.
} Request for Instructions.

The defendant in error, who was plaintiff in the circuit court, eastern district of New York, having entered judgment against plaintiff in error for $15,356.38 upon the verdict of a jury, a writ of error was duly sued out, and the cause came on for hearing before the three circuit judges sitting in court of appeals at a regular term thereof. Thereupon it appeared that Judge Shipman was disqualified, and argument of the writ of error proceeded before the two circuit judges named in the caption hereof. Upon the questions of law arising on such writ of error the said circuit court of appeals for the second circuit desires the instruction of the Supreme Court of the United States for its proper decision.

2 *Statement of Facts.*

The action was brought by Keegan, a brakeman in the employ of the plaintiff, to recover damages for personal injuries received under these circumstances:

Five men—O'Brien, Keegan, Lally, Gooley, and Ward—were on the night of the accident (Oct. 7, 1889) in the service of the Central Railroad of New Jersey, and employed in its yard at Jersey City. They comprised what was called the "night-float drill-crew," the duty of such crews being to take cars from the tracks on which they had been left by incoming trains and place them on the floats, by which they were transported across the North river to the city of New York. The drill-crews, like others employed in the same yard, received their general instructions from Dent, the yard master. The men composing such crews were hired by Dent and discharged by him, and he had the general charge of the yard and yardmen and assigned them to their duties.

The course of business was as follows: Dent, the yard master, gave to O'Brien drill-slips—that is, slips of paper containing the numbers of the cars and the particular tracks leading to the floats on which these cars were to be placed. These float-tracks were five in number, and were connected by switches with the other tracks in the yard. The execution of this order required frequent switching of cars from one set of tracks to another in order to sort out from arriving trains the particular car or cars to be placed
3 on a particular float-track. It also required the making up of trains of cars sometimes longer, sometimes shorter; their

movement by the engine attached to them forward or backward and at varying rates of speed; the braking, coupling, and uncoupling of the cars composing them. Ward was engineer. Lally had his post on some car near the engine in order to transmit to the engineer any signals received. He also helped the engineer with coal and water and acted as brakeman. Keegan did the coupling; Gooley, the uncoupling, and acted a brakeman, while the turning of the switches was attended to by O'Brien. The direction of all these operations was with O'Brien, who is called in the evidence sometimes "foreman driller," sometimes "conductor of the drill-crew." He was the one to direct what cars should be taken on by the engine and when, where they should be moved to, when the movement should start, and where it should stop; and it was in obedience to his orders that one or other of the men employed in his crew went to one place or another and coupled or uncoupled particular cars. The general management of the operation was with him, and he had control over the persons employed therein.

On the night of the accident Keegan, who had been relighting his lantern at the engine, which was then standing still, attached to several cars, walked to the rear end of the train. O'Brien and Gooley were standing there looking over the drill-slip. There were some other cars standing on the same track, about 40 feet beyond the end of the cars to which the engine was attached. O'Brien told Gooley what cars were to be uncoupled. He then told
4 Keegan to couple the train onto the cars beyond. Keegan took the coupling link of the rear car in his right hand, and, having signalled for the train to back slowly, walked towards the detached cars, with the rear end of the last car at his back. Before he reached them he caught his right foot in the guard-rail of a switch, and at once called out to hold up the train. His call was heard, and the engine stopped immediately. Gooley, however, had already, on O'Brien's order, drawn the pin and thus uncoupled the cars indicated, so that when the engine pulled up it did not stop their backward movement. Neither Gooley nor O'Brien were on the cars thus moving backwards, so there was no one to check their motion by applying the brakes, and as a consequence the rear wheel passed over Keegan's leg, producing the injuries complained of.

There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering defendant in error to couple cars which he had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond them without himself being on the moving — or seeing that either Gooley or Lally were there to exercise control over their movement.

The jury, by their verdict, found that O'Brien was negligent.

On these facts the judges composing the court differed in opinion, as appears by the following memoranda:

5 WALLACE, *Circuit Judge:*

Aside from reasons which lead me to regard some of the other assignments of error as meritorious, I think those are well taken which impugn the rulings of the trial judge upon the question whether the defendant was responsible for the negligent acts of O'Brien, foreman or so-called conductor of the drill-crew. The facts seem to me to assimilate the case more closely to that of Railroad Company *vs.* Baugh (149 U. S., 379) than to that of Ross *vs.* Railroad Company (112 U. S., 377).

6 LACOMBE, *Circuit Judge:*

I feel constrained by the decision in Chicago & Milwaukee R. R. *v.* Ross, 112 U. S., 394, to vote for affirmance. Although O'Brien was not the conductor of a passenger train running between terminal points on the main line, the evidence shows that he had the general management of this freight-yard train, had command of its movements, and was placed in control over those employed upon it. The starting, the stopping, the movement of the train, were subject to his orders, and it was from him that the subordinate employees received directions where to go and what to do. This seems to be in principle the case stated at the foot of p. 394 in the decision above referred to.

Upon the facts above stated, therefore, this court desires instruction upon questions of law for the proper decision of said cause, namely:

Whether the defendant in error and O'Brien were or were not fellow-servants.

Whether for negligence of O'Brien in failing to place himself or some one else at the brake of the backwardly moving cars the plaintiff in error is responsible.

And to that end hereby certifies said questions to the Supreme Court.

New York, April 20th, 1894.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.

7 UNITED STATES OF AMERICA, }
Second Circuit, } *ss:*

I, John A. Shields, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The Central Railroad Company of New Jersey, plaintiff in error, *vs.* Bernard Keegan, defendant in error, was duly filed and entered of record in my office by order of said court on the twenty-third day of April, 1894, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this twenty-sixth day of April, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JOHN A. SHIELDS,
Clerk United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] U. S. circuit court of appeals, second circuit. The Central Railroad Company of New Jersey, plaintiff in error, *vs.* Bernard Keegan, defendant in error. Request for instructions. United States circuit court of appeals, second circuit. Filed Apr. 23, 1894. John A. Shields, clerk.

Endorsed on cover: Case No. 15,585. U. S. circuit court of appeals, second circuit. Term No., 1201. The Central Railroad Company of New Jersey, plaintiff in error, *vs.* Bernard Keegan. Filed May 2nd, 1894.

FILED.
OCT 8 1894
JAMES H. McKENNEY
CLERK

Supreme Court

OF THE UNITED STATES.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff in Error,

against

BERNARD KEEGAN,

Defendant in Error.

Notice of Motion to Advance on, Certified Requests for Instruction with Opinions and Questions from the United States Circuit Court of Appeals, Second Circuit, Affidavits and Statement.

A. G. VANDERPOEL,
Atty. for Defendant in Error, also Counsel,
Nos. 93-99 Nassau Street,
New York City.

DEFORREST BROTHERS,
Attys. for Plaintiff in Error,
62 William Street,
New York City.

NEW YORK.
C. B. MERWIN, Printer, 218 Fulton Street.
Telephone: 2599 Cortl't.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 701.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

BERNARD KEEGAN, DEFENDANT IN ERROR.

Comes now Bernard Keegan, the defendant in error, by A. G. Vanderpoel, his attorney and counsel, and moves the Court to advance the case of The Central Railroad Company of New Jersey, plaintiff in error, against Bernard Keegan, defendant, and for cause shown in the following annexed papers, to wit:

1st. Notice of this motion.

2d. Requests for instruction from United States circuit court of appeals for the second circuit and statement of facts and opinions of the circuit judges.

3d. Statement of A. G. Vanderpoel, attorney and counsel for defendant in error.

4th. Affidavit of Augustus G. Vanderpoel.

5th. Affidavit of Bernard Keegan, defendant in error.

A. G. VANDERPOEL,
Attorney for Defendant in Error.

Supreme Court of the United States

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

against

BERNARD KEEGAN,
Defendant in Error.

2

Notice of Motion.

GENTLEMEN:

Please take notice that the Defendant in Error herein, will make a motion to advance the above entitled case from its regular order on the docket of this Court, and to have it set down for final disposition on the merits, on submission of briefs only, on the second Monday of October, 1894, at 12 3 o'clock, noon of that day, or as soon thereafter as counsel can be heard at the Capitol, Washington, D. C., or for such other and further relief as may appear just and meet to this Court. That said motion will be made on all the proceedings herein and on the annexed affidavits of Bernard Keegan, Defendant in Error herein, verified on the 29th day of September, 1894, and of Augustus G. Vanderpoel, attorney for Defendant in Error herein veri-

4 fied, on the 29th day of September, 1894, requests for instructions, also on the statement hereto annexed.

New York, September 29th, 1894.

Attorney and Counsel for Defendant in Error.
Nos. 93 and 99 Nassau Street,
New York City.

To

DE FORREST BROS., Esqs.,
Attorneys for Plaintiff in Error,
No. 62 William Street,
New York City.

5

6

U. S. CIRCUIT COURT OF APPEALS, 7

FOR THE SECOND CIRCUIT.

April 1894.

Present:

Hon. WILLIAM J. WALLACE,
and
Hon. E. HENRY LACOMBE,
Circuit Judges holding said Court.

The Central Railroad Company of New Jersey,
Plaintiff in Error, 8

against

BERNARD KEEGAN,
Defendant in Error.

Request
For Instructions.

The defendant in error, who was plaintiff in the Circuit Court, Eastern District of New York, having entered judgment against plaintiff in error for $15,356.38 upon the verdict of a jury, a writ of error was duly sued out, and the cause came on for 9
hearing before the three Circuit Judges, sitting in Court of Appeals at a regular term thereof. Thereupon, it appeared that Judge Shipman was disqualified, and argument of the writ of error proceeded before the two Circuit Judges named in the caption hereof. Upon the questions of law arising on such writ of error, the said Circuit Court of Appeals for the Second Circuit desires the instruction of the Supreme Court of the United States for its proper decision.

10 STATEMENT OF FACTS.

The action was brought by Keegan, a brakeman in the employ of the plaintiff, to recover damages for personal injuries received under these circumstances.

Five men, O'Brien, Keegan, Lally, Gooley and Ward were, on the night of the accident, (October 7, 1889), in the service of the Central Railroad of New Jersey, and employed in its yard at Jersey City. They comprised what was called the "night float drill crew," the duty of such crews being to take cars from the tracks on which they had been
11 left by incoming trains, and place them on the floats by which they were transported across the North River to the City of New York. The drill crews, like others employed in the same yard, received their general instructions from Dent, the yardmaster; the men composing such crews were hired by Dent and discharged by him.

The course of business was as follows: Dent, the yardmaster, gave to O'Brien drill slips, that is, slips of paper containing the numbers of the cars, and the particular tracks leading to the floats on which these cars were to be placed. These float tracts were five in number, and were connected by switches with the other tracks in the yard. The
12 execution of this order required frequent switching of cars from one set of tracks to another, in order to sort out from arriving trains the particular car or cars to be placed on a particular float track. It also required the making up of trains of cars, sometimes longer, sometimes shorter, their movement by the engine attached to them forward or backward, and at varying rates of speed, the braking, coupling and uncoupling of the cars composing them. Ward was engineer, Lally had his post on

some car near the engine, in order to transmit to the 13
engineer any signals received, he also helped the engineer with coal and water, and acted as brakeman. Keegan did the coupling, Gooley the uncoupling, and acted as brakeman, while the turning of the switches was attended to by O'Brien. The direction of all these operations was with O'Brien, who is called in the evidence sometimes "foreman driller," sometimes "conductor of the drill crew." He was the one to direct what cars should be taken on by the engine, and when; where they should be moved to; when the movement should start and where it should stop; and it was in obedience to his orders that one or other of the men employed in his crew went to one place or 14
another, and coupled or uncoupled particular cars. The general management of the operation was with him, and he had control over the persons employed therein.

On the night of the accident Keegan, who had been re lighting his lantern at the engine, which was then standing still attached to several cars, walked to the rear end of the train. O'Brien and Gooley were standing there, looking over the drill slip. There were some other cars standing on the same track, about 40 feet beyond the end of the cars to which the engine was attached. O'Brien told Gooley what cars were to be uncoupled. He
then told Keegan to couple the train on to the cars 15
beyond. Keegan took the coupling link of the rear car in his right hand, and having signalled for the train to back slowly, walked towards the detached cars, with the rear end of the last car at his back. Before he reached them he caught his right foot in the guard rail of a switch, and at once called out to hold up the train. His call was heard and the engine stopped immediately. Gooley, however, had already, on O'Brien's order, drawn the pin and

16 thus uncoupled the cars indicated, so that when the engine pulled up it did not stop their backward movement. Neither Gooley nor O'Brien were on the cars thus moving backwards, so there was no one to check their motion by applying the brakes; and, as a consequence, the rear wheel passed over Keegan's leg, producing the injuries complained of.

There was evidence tending to show that under circumstances such as these, O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering these cars to be uncoupled from the train after he had ordered the defendant in
17 error into a position of danger between them and the stationary cars beyond them, and before he had provided them with a person to act as brakeman, and thus exercise control over their movement.

The Jury, by their verdict, found that O'Brien was negligent

On these facts the Judges composing the Court differed in opinion, as appears by the following memoranda:

WALLACE, Circuit Judge:

Aside from reasons which lead me to regard
18 some of the other assignments of error as meritorious, I think those are well taken which impugn the rulings of the Trial Judge upon the question whether the defendant was responsible for the negligent acts of O'Brien, foreman, or so-called conductor of the drill crew. The facts seem to me to assimilate the case more closely to that of Railroad Company vs. Baugh, (149 U. S., 379,) than to that of Rose vs. Railroad Company, (112 U. S., 377.)

LACOMBE, Circuit Judge

I feel constrained by the decision in Chicago & Milwaukee R. R. vs. Ross, 112 U. S., 394, to vote for affirmance. Although O'Brien was not the conductor of a passenger train running between terminal points and the main line, the evidence shows that he had the general management of this freight yard train, had command of its movements, and was placed in control over those employed upon it. The starting, the stopping, the movement of the train, were subject to his orders, and it was from him that the subordinate employees received directions where to go, and what to do. This seems to be, in principle, the case stated at the foot of page 394, in the decision above referred to.

Upon the facts above stated, therefore, this Court desires instruction upon questions of law for the proper decision of said cause, namely:

Whether the defendant in error and O'Brien were or were not fellow servants?

Whether for negligence of O'Brien in failing to place himself at the brake of the backwardly-moving cars, the plaintiff in error is responsible?

Whether for negligence of O'Brien in directing the backwardly-moving cars to be uncoupled, and left without a brakeman, the plaintiff in error is responsible?

And to that end hereby certifies said questions to the Supreme Court.

22 SUPREME COURT

OF THE UNITED STATES.

THE CENTRAL RAILROAD COMPANY, of New Jersey,
Plaintiff in Error,

against

BERNARD KEEGAN,
Defendant in Error.

Statement.

23

The defendant in error herein, is a young man, and so dreadfully injured as to prevent him from doing manual labor or from earning his support, and that he is wholly without means. One leg is off, the other destroyed for use, and his left arm is permanently injured, and the power therein greatly reduced, and his health completely shattered. Defendant in error, so injured in October, 1889, solely by the negligence of plaintiff in error—thus five years have passed up to this date.

He recovered a judgment for $15,356.38, and
24 plaintiff in error appealed to the United States Circuit Court of Appeals, Second Circuit, two only of the judges sitting. Judge Shipman was disqualified, and argument proceeded before Judges Wallace and LaCombe, each of whom attached an opinion to their certificate to this Court, but Judge Shipman, in the case of Canadian Pacific Railroad Company against Johnson, Circuit Court of Appeals May 30th, 1894, Fed. Rep., vol. 61, p. 738, in an able and long opinion, presenting the question of

the relation of the Baugh to the Ross case, and, 25
(in which case argument was had only two or three days after the case at bar), affirmed the judgment on a large verdict, in behalf of a brakeman on a a freight train, for the negligence of the conductor, and Judge Wallace concurred therein, although Judge Shipman's opinion held the con ductor not to have been a fellow servant as to his subordinates on his train.

The questions of law, certified to this Court for answer, are presented by the request for instructions and Statement of Facts herein contained, and the questions of Law required to be answered for the United States Circuit Court of Appeals for the Second Circuit, have their origin in turn, in the 26
different interpretations of the two cases commonly known as the *Baugh* and *Ross* cases.

The questions certified in case at bar to this Court, when taken with the recited fact supra towit in substance that a conductor is not a fellow servant with his subordinates on his train. Canadian Pacific Railroad Company, against Johnson, May 20th, 1894. Federal Rep. Vol. 61, p. 738, as appears by Judge Shipman's opinion therein, present plainly the apparent embarrasment of the United States Circuit Court of Appeals, on questions arising on the relations between the Baugh and Ross cases, which if continued that the case at bar is reached in its regular order on the docket of this Court, amounts to the denial of justice. 27

This cause it is submitted, should be advanced from its place on the regular docket of this Court, as has been the practice in other cases where questions of law have been certified to this Court for instructions on a statement of facts, also certified by United States Circuit Court of Appeals.

A. G. VANDERPOEL,
Attorneys and Counsel for defendant in error,
Nos. 92-99 Nassau St.,
New York City.

28 SUPREME COURT,

OF THE UNITED STATES.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

against

BERNARD KEEGAN,
Defendant in Error.

Affidavit.

29 City, County and State of New York, ss:

Augustus G. Vanderpoel, being duly sworn deposes and says: that he has read the statement herein and that it is true to his own knowledge, and that the plaintiff is and was a temperate, industrious and honest young man, and that this case should be taken out of its regular order on the docket of this Court, and heard and determined by this Court on the second Monday of October, 1894, or at as early day thereafter as may be the pleasure of this Court.

Deponent further says, that according to practice, this deponent did on the 16th day of August,
30 1894, cause to be served personally upon one of the attorneys for the plaintiff in error, a letter of which the following is a copy, and this deponent has received no reply thereto. "A. G. Vanderpoel, attorney and counsellor at law, Bennett Building, 99 Nassau Street, New York, Aug. 12th, 1894. De Forest Brothers, Gentlemen: In the case of the Central Railroad Company of New Jersey vs, Keegan, on certificate from the Circuit Court of Ap-

peals, 2nd Circuit, No. 701, on the docket for October Term, 1894, I intended to serve you with notice to advance for the 2nd Monday of October, 1894, at Washington, and I desire to know if you will consent, that if the Court grants the motion for the advancement of the cause, that the argument be made and brief submitted on that same day, time and place. 31

Kindly indicate in a note your pleasure in the premises, on the receipt of this letter and oblige,

Yours respectfully,

A. G. VANDERPOEL,

Atty. for BERNARD KEEGAN.

Sworn to before me this 29th day of September, 1894.

A. G. Vanderpoel

Geo R Carrington
Notary Public
City & Co. N.Y.

33

34 SUPREME COURT,

OF THE UNITED STATES.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

against

BERNARD KEEGAN,
Defendant in Error.

Affidavit of Bernard Keegan.

35

City, County and State of New York, ss:

BERNARD KEEGAN, being duly sworn, deposes and says, that he has heard read the statement herein made by and signed by A. G. Vanderpoel, and that it is in all things within his knowledge true, and that he is the defendant in error herein; and that he was hurt at the time and place therein designated, and that he has suffered and is constantly suffering great pain from his injuries, and is wholly incapacitated from earning his living, and is wholly without means, and that he is informed that his case having been certified to this Court and
36 being No. 701 on its docket, would take three years in its regular order to be reached, and that delay would amount to an increased hardship on him, and greatly augment his sufferings, and amount in fact to a practical denial of justice toward him in in this case. And he is informed by his counsel, the defendant cannot suffer by this cause being advanced, because if the questions certified are answered in its favor, then this defendant has to

have a new trial—which will take a long time, and in the regular course years still be consumed, and it be provided with a new defense. 47

Donald Keeg

Sworn to before me, this 24 day of September, 1894.

Geo. R. Carrington
Notary Public
Kings County, New York.

88

89

FILED.
OCT 8 1894
JAMES H. McKENNEY,
CLERK

Supreme Court

OF THE UNITED STATES.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff in Error,

against

BERNARD KEEGAN,

Defendant in Error.

Brief on Behalf of Defendant in Error in Motion to Advance. Case No. 701.

A. G. VANDERPOEL,
Atty. for Defendant in Error, also Counsel,
Nos. 93-99 Nassau Street,
New York City.

DeForrest Brothers,
Attys. for Plaintiff in Error,
62 William Street,
New York City.

New York.
C. B. Merwin, Printer, 218 Fulton Street.
Telephone: 2599 Cortl'd.

Supreme Court.

OF THE UNITED STATES.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

against

BERNARD KEEGAN,
Defendant in Error.

Brief for Defendant in Error.

The defendant in Error in this his Brief on the questions of Law and Fact, certified to this Court by the United States Circuit Court of Appeals for the Second Circuit respectfully submits.

I.

That the case of Ross in 112 United States Reports (p. 377,) stands as the law to-day in fact and in law in that case, there was a conductor of a freight train present.

II.

That the case of Baugh, 149 U. S. P. 368; was a case where in fact and in law, there was no conductor present.

III.

That the case of Northern Pacific Railroad Co. against Hambly decided May, 26th, 1894, on certificate of questions to Supreme Court of the United States.

May be taken as the judicial construction of the relation of the Baugh case to the Ross case.

IV.

That the test of liability of the master for act of servant is given in the Ross case, in Baugh and Hambly cases—Ross case in following words: "The "conductor has entire control and management of "the train to which he is assigned. He directs "when it shall start, at what speed it shall run, at "what station it shall stop, and for what length of "time, and everything essential to its successful "movements, and all persons employed on it, are "subject to his orders 112 U. S. foot of p. 394." Baugh case, Judge Brewer cites with approval the following words, the same as above quoted, 149 U. S. p. 381.

Northern Pacific vs. Hambly, Judge Brown, characterizes the Ross case and quotes from it as follows: "The case was decided not to be one of fellow "service upon the ground that the conductor was "(he here adopts the words of the Ross case) in "fact, and should be treated as, the personal

"representative of the corporation, for whose "negligence it is responsible to subordinate ser- "vants. The Court drew a distinction between "servants of a corporation exercising no supervi- "sion over others, engaged with them in the same "employment and agents of a corporation, clothed "with the control and management of a distinct "department, in which their duty is entirely that of "direction and superintendence. In that particular "case the Court found that the conductor had entire "control and management of the train to which "he was assigned, directed at what time it should "start, at what speed it should run, at what stations "it should stop, and for what length of time, and "every thing essential to its successful movements, "and that all persons employed upon it were sub- "ject to its (orders) the word ('orders') referred to "the orders of the conductor.

"Under such circumstances he was held not to be "a fellow servant with the fireman, brakeman and "engineer, citing certain cases from Kentucky and "Ohio," 154 U. S., p. 359.

V.

O'Brien was a conductor and the proximate cause of plaintiff's injury was his, O'Brien's negligent order to Gooley to pull the pin, and it is respectfully submitted that the giving that order was a negligent masterial act in law.

It is respectfully submitted that the questions of law certified to this Court herein, should be so answered as to permit the Court below to affirm the judgment with costs.

A. G. Vandeport
Attorney & Counsel
for Defendant.

Office Supreme Court, U. S.
FILED
DEC 1 1894
JAMES H. McKENNEY,
CLERK

EVENING POST JOB PRINTING HOUSE, N. Y.

Supreme Court of the United States.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff in Error,

vs.

BERNARD KEEGAN,
Defendant in Error.

BRIEF FOR THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR, ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE QUESTIONS CERTIFIED AND THE NEGLIGENCE COMPLAINED OF ARE NOT AS STATED IN THE BRIEF OF DEFENDANT IN ERROR.

(The differences are indicated by italics.)

THE QUESTIONS CERTIFIED.	THE QUESTIONS ERRONEOUSLY STATED IN DEFENDANT'S BRIEF TO HAVE BEEN CERTIFIED.
(1.) Whether the defendant in error and O'Brien were or were not fellow servants.	(This question is correctly stated in the brief.)
(2.) Whether for negligence of O'Brien in failing to place himself *or some one else* at the brake of the	(2.) Whether for negligence of O'Brien in failing to place himself at the brake of the backwardly

backwardly moving cars the plaintiff in error is responsible.

(No such question is certified.)

THE NEGLIGENCE COMPLAINED OF AS CERTIFIED.

There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering *defendant in error to couple cars which he had just ordered to be uncoupled from a backwardly moving train without himself being on the moving, or seeing that either Gooley or Lally were there to* exercise control over their movement.

moving cars the plaintiff in error is responsible.

(3.) *Whether for negligence of O'Brien in directing the backwardly moving cars to be uncoupled and left without a brakeman the plaintiff in error is responsible.*

THE NEGLIGENCE COMPLAINED OF AS ERRONEOUSLY STATED IN DEFENDANT'S BRIEF TO HAVE BEEN CERTIFIED.

There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward and the negligence complained of was his ordering *these cars to be uncoupled from the train after he had ordered the defendant in error into a position of danger between them and the stationary cars beyond them and before he had provided them with a person to act as brakeman and thus* exercise control over their movement.

THE CRUCIAL QUESTION IN DETERMINING WHETHER THE LEGAL RELATION OF "FELLOW SERVANT" DOES OR DOES NOT EXIST.

"The question turns rather on the *character of the* "*act* than on the relations of the employees to each "other. If the act is one done in the discharge of "some positive duty of the master to the servant, "then negligence in the act is the negligence of the "master, but if it be not one in the discharge of such "positive duty then there should be some personal

" wrong on the part of the employer before he is held " liable therefor."

Baugh Case, 149 U. S., 387.

The question is not whether the person whose negligence causes the injury has the *right* to command or control; it is whether the negligent act is in the exercise of the right to so command or control, and in the discharge of some positive duty of the master. It is not whether the negligent party is master or holds an office which entitles him to act for the master, it is whether the negligent act is done in the capacity of master or master's representative and in the discharge of some duty as such.

E. G.: Suppose the owner of a small carpet mill, after having directed his hands what looms to work and how much of a particular pattern to make as the day's stint, is accustomed to take his place with the others at the looms and weave with them without further command or control, and while weaving negligently runs his machine so as to injure a fellow workman, he is not liable *qua* master, but only as one fellow-servant is to another; but if he negligently directs one of his fellow workmen to use a loom known to him to be imperfect and the workman is injured because of its imperfection, he is liable *qua* master though he be weaving at the time of the accident as a fellow workman at an adjacent loom. He may at all times be addressed by his workmen as " master " or " boss," but " the inquiry " must always be directed to the real powers and " duties of the official and not simply to the name " given to the office " (Baugh, Case, p. 379).

So the Ross case " decided," as is stated in the opinion of the Court in the Baugh case, " that a con- " ductor of a railroad train, who has a right to com-

" mand the movements of a train and control the " persons employed upon it, represents the company " *while performing those duties*, and does not bear the " relation of fellow servant to the engineer and other " employees on the train." Why? Because in performing those duties he acted as master.

Suppose the conductor of the train in the Ross case had not presented himself when it started and the superintendent had delegated the right to command and control the train to one of the brakemen, and that brakeman had been guilty of the same negligence as the conductor actually was guilty of? The company would have been none the less liable, though the negligence was that of a brakeman. Suppose, on the other hand, the conductor in the Ross case had been accustomed, as frequently occurs, to perform the duties of brakeman in stopping the train at a signal from the engineer and Ross' injury had resulted from the conductor's negligence in failing to obey the signal and apply the brakes? The company would not have been liable, though he held the position of conductor.

The leading cases in the " fellow servant " question in the United States Supreme Court are all consistent with the conclusion reached by that Court in the Baugh case, viz.:

" That the liability was not made to depend in any " manner on the grade of service of a co-employee, " but upon the *character* of the act itself and a *breach* " of the positive obligation of the master." * * *

" It may safely be said that the Court has never " recognized the proposition that the mere control " of one servant over another in doing a particular " piece of work destroys the relation of fellow ser-

" vants, and puts an end to the master's liability. " On the contrary, all the cases proceed on the ground " of some breach of positive duty resting upon the " master, or upon the idea of superintendence or " control of a department. It has ever been affirmed " that the employee assumes the ordinary risks inci- " dent to the service; and, as we have seen, it is ob- " vious that there is risk from the negligence of one " in immediate control as from one simply a co- " worker.

Baugh Case, p. 389.

This conclusion is reiterated and emphasized in the recent case of *Railroad Co.* v. *Hambly*, 154 *U. S., at p.* 360.

After reviewing the Ross and Baugh, the Court states: " That to hold the principal liable whenever " there are graduations of rank between the person " receiving and the person causing the injury, or " whenever they are employed in different depart- " ments of the same general service, would result in " frittering away the whole doctrine of fellow ser- " vice; cases arising between persons engaged to- " gether in the same identical service, as, for instance, " between brakemen of the same train or two seamen " of equal rank in the same ship, are comparatively " rare. In a large majority of cases there is some " distinction, either in respect to grade of service or " in the nature of their employment. Courts, how- " ever, have been reluctant to recognize these dis- " tinctions, unless the superiority of the person caus- " ing the injury was such as to put him rather in the " category of principal than of agent, as, for example, " the superintendent of a factory or railway, and the " employments were so far different, that although " paid by the same master, the two servants were

" brought no farther in contact with each other than " as if they had been employed by different prin- " cipals."

In Randall *v.* Baltimore & Ohio Railroad Company, 109 U. S., 478, an engineer of a train in a railroad yard was injured by the negligence of a brakeman of another train who was working a switch on an adjacent track. They were held to be fellow servants, though in different grades of service and belonging to different crews. There was no breach of any obligation of the master to the engineer.

In Northern Pacific Railroad Company *v.* Hubert, 116 U. S., 642, a brakeman was injured by a defective brake which had been allowed to get out of repair by the negligence of an employee of the company charged with the duty of keeping the car in order. The brakeman and this employee were held not to be fellow servants and the master was held liable. There was a breach of the obligation of the master to keep the cars in order, as a result of which the brakeman was injured.

In Quebec Steamship Company *v.* Merchant, 133 U. S., 375, a stewardess was injured by the negligence of the ship carpenter and porter, whose duty it was to properly replace a gangway railing. They were held to be fellow servants. The grade of these employees was different and they were in different departments. There was, however, no breach of any obligation of the master to the stewardess.

In Chicago and Milwaukee R. R. Co. *v.* Ross, 112 U. S., 377, the conductor of the train was by the rules of the company given charge and control of the train and of all persons employed on it, and was made responsible for its movements while on the road. While

on the road, the conductor received a telegram from the dispatcher to hold his train at a way station until another train had arrived. He was charged by the company with the duty of delivering this order to the engineer. He neglected to so deliver it, and as a direct result of this neglect the injury occurred. The company owed a positive duty to its employees on this train to notify them of the movement of the other train and where to stop to avoid collision. Under its rules this duty was placed upon the conductor. His failure to perform it was a breach of its positive obligation to its employees.

In Northern Pacific Railroad Company *v.* Hambly, 154 U. S., 349, a track laborer working under a section boss on a culvert was injured by the negligence of the conductor and engineer of a passenger train. The grade of service of these employees was different. They were in different departments. They were, however, held to be fellow servants and the company exonerated. There was no breach of obligation of the company to the laborer.

That the liability of the master for negligence of a fellow servant depends not upon the grade of service but upon the character of the act and upon a breach of positive obligation of the master to the servant, see

McKinney on Fellow Servants (1890), Section 23, p. 53, and numerous cases there cited.

The Crucial Question Applied to the Facts of This Particular Case.

Was the failure of O'Brien or some one else to be at the brake of the backwardly moving cars an act

performed by O'Brien in the "character" of master, resulting from his authority to control, and was it "a breach of the positive obligation of the master" to Keegan?

All the five men who composed this "night float drill crew" had their particular duties in accomplishing a single purpose, that is, "to take cars from the tracks on which they had been left by incoming trains and place them on the floats by which they were transported across the North River to the City of New York." They constituted, so to speak, a human machine, each part of which performed its function according to a regular "course of business" to produce a single result. The result which this machine was to produce was determined by the yardmaster, Dent, who undoubtedly stood toward the crew in the relation of master and directly represented the company. The master's orders given through Dent went no further than to indicate the particular result desired, that is, what cars were to be moved and on what particular tracks leading to the floats these cars were to be placed. Dent communicated to O'Brien these orders by means of "drills slip," that is, "slips of paper containing the numbers of the cars and the particular tracks leading to the floats on which these cars were to be placed," and O'Brien in his turn communicated these orders to the rest of the crew. O'Brien's function of master ended after these orders were given and the crew were told what cars were to be moved and where they were to be moved to. He gave no direction as to precisely how the order was to be executed. Whether the coupler, Keegan, should couple before or after the uncoupler Gooley uncoupled, or whether the coupler Keegan, whose

signal to the engineer was to set this human machine in motion, should give the signal before or after he saw that O'Brien or some one else was at the brakes, were all details of the method in which this order was to be executed which the different members of the crew determined because they were accustomed to work together in a regular "course of business." Nor could, in the nature of things, all details of executing such an order be absolutely prescribed. Its execution "required frequent switching of cars from "one set of tracks to another in order to sort out "from arriving trains the particular car or cars to be "placed on a particular float track. It also required "the making up of trains of cars, sometimes "longer, sometimes shorter, their movement by "the engine attached to them forward or back-"ward and at various rates of speed, the breaking, "coupling and uncoupling of the cars composing "them. Ward was engineer; Lally had his post on "some car near the engine in order to transmit to the "engineer any signals received. He also helped the "engineer with coal and water and acted as a brake-"man. Keegan did the coupling, Gooley the uncoupl-"ing, and acted as brakeman, while the turning of the "switches was attended to by O'Brien." Once the order given and once the machinery to execute it set in motion, each man knew his place and his duty, and had a right to rely upon the others as faithful fellow servants to know theirs. It was a "positive obligation of the master" to carefully select this crew, to see that the engine and cars with which it did its work were in proper order, and to maintain the tracks on which the work was done in good repair; but the possible consequences to any member of the crew of negligence on the part of another member in

executing the order after it was given were risks which each man took when he became a member of the crew, and for which the master could not be held responsible. O'Brien's duty as conductor or master ceased when he had designated the particular cars to be moved and the place where they were to be put. The responsibility of each member of the crew to the others as fellow servants began when they started to execute the order in the ordinary course of business, each one performing his part of the work. There was no order given or control exercised by O'Brien which changed the ordinary course of business after Keegan, the coupler, and Gooley, the uncoupler, stood with him on the track and learned from him what cars were to be uncoupled and on to what train they were to be coupled, nor was Keegan when he started to couple ignorant that Gooley was to uncouple. All three, O'Brien, Keegan and Gooley, stood together while O'Brien looked over the drill slip which informed him what cars were to be moved. O'Brien told Gooley what cars were to be uncoupled; he "then" told Keegan to couple the train on to the cars beyond. Here O'Brien's function of conductor exercising control ended and the control passed to Keegan, the man who was injured, for it was he who was to set the machinery in motion by his signal. The sequence of events which led to the accident is thus succinctly stated in the certificate:

"Keegan took the coupling link of the rear car in "his right hand, and having signaled for the train to "back slowly, walked towards the detached cars, "with the rear end of the last car at his back. Before "he reached them he caught his right foot in the

"guard-rail of a switch, and at once called out to hold "up the train. His call was heard and the engine "stopped immediately. Gooley, however, had al- "ready, on O'Brien's order, drawn the pin and thus "uncoupled the cars indicated, so that when the en- "gine pulled up it did not stop their backward move- "ment.

"Neither Gooley nor O'Brien were on the cars "thus moving backwards, so there was no one to "check their motion by applying the brakes, and as a "consequence the rear wheel passed over Keegan's "leg, producing the injuries complained of.

There was an effort in making up the certificate indicated by the variation between its form as found in the brief of defendant in error and as actually certified to show that O'Brien's function of conductor in control continued after Keegan started to couple, and if the facts had been certified as in defendant's brief, and if one of these facts had been that O'Brien ordered the cars to be uncoupled from the train after he had ordered Keegan into a position of danger between them and the stationery cars beyond them and before he had provided them with a person to act as brakeman and thus exercise control over their movement, it might be argued that the accident was due to O'Brien's function as conductor in control; but the facts on which this argument might be based did *not exist* and are *not certified*. O'Brien did not order the cars to be uncoupled "after" ordering Keegan to couple. The orders were given to both Keegan and Gooley in each other's presence, and the order to uncouple preceded the order to couple. Nor did O'Brien order Keegan into "a position of danger" between two lines of cars. He only ordered

him to couple. The method of coupling was entirely in Keegan's discretion. It was Keegan who by his own chosen method of coupling by walking on the track between the cars, unnecessarily placed himself in the "position of danger." Nor is there any fact in the case to indicate a duty on O'Brien's part to "provide" the moving cars with a brakeman from which some obligation as conductor in control might be inferred. There was simply "evidence tending to show that, under circumstances such as these, O'Brien or some one else should have been on the rear car of those moving backward."

The case is closely analogous to a recent case before the New York Court of Appeals—Potter *v.* Railroad Company, 136 N. Y., p. 77—in which at page 82 the Court uses the following language:

"It is quite obvious that the work of shifting cars "in a railroad yard must be left in a great measure "to the judgment and discretion of the servants of "the railroad who are entrusted with the manage- "ment of the yard. The details must be left to them, "and all that the company can do for the protection "of it employees is to provide competent co-servants, "and prescribe such regulations as experience shows "may be best calculated to secure their safety."

"IT MAY BE FURTHER NOTICED THAT IN THIS PAR- "TICULAR CASE THE INJURY WAS NOT IN CONSE- "QUENCE OF "KEEGAN'S" OBEYING ANY ORDERS "OF HIS SUPERIOR OFFICER. IT DID NOT RESULT "FROM THE MERE MATTER OF CONTROL."

Baugh case, 149 U. S., p. 389.

After the cars to be moved and the places to which they were to be moved were designated, it

was Keegan, the injured man, who controlled. It was he who was to direct "when the movement should start" and the accident occurred either through negligence on his part in starting the movement before the brakemen were at their place or negligence on the part of the brakemen in not performing their part in a train movement executed by the entire crew according to an ordinary course of business, during the execution of which each had no further responsibility than to perform his part and in the ordinary course of which no one of the crew stood in the position of master or exercised any control as master over the movements of the other. After Keegan and Gooley had heard the contents of the train slip and left O'Brien to couple and uncouple respectively, the control passed to Keegan, who directed when the movement should start, and continued in Keegan to direct the movement to stop by signal. The reason the train did not stop on Keegan's calling out was either that his fellow servant had uncoupled too soon or that some one of his fellow servants was not in his proper place at the brake.

THE TWO QUESTIONS CERTIFIED SHOULD BE ANSWERED AS FOLLOWS:

1. Whether the defendant in error and O'Brien were or were not fellow servants is a question which can only be properly answered in relation to the character of the act which caused Keegan's injury. They were fellow servants in relation to Keegan's injury, because it did not occur as the result of any act of O'Brien "in the discharge of some positive duty" of the master to the servant, and there was no "personal wrong on the part of the employer."

2. The plaintiff-in-error is not responsible for negligence of "O'Brien or some one else" in not having been at the brake of the backwardly moving cars.

ROBERT W. DEFOREST,
Attorney and of Counsel,
62 William St.,
New York.

GEORGE HOLMES,
Of Counsel.

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 701.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

against

BERNARD KEEGAN, DEFENDANT IN ERROR.

Brief on Behalf of Defendant in Error.

(This Brief Contains the Statement of Facts, Opinions, and Requests of the Circuit Court Judges.)

A. G. VANDERPOEL,
Att'y for Defendant in Error, also Counsel,
Nos. 93–99 Nassau Street,
New York City.

DEFORREST BROTHERS,
Att'ys for Plaintiff in Error,
62 William Street,
New York City.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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BRIEF FOR DEFENDANT IN ERROR.

This case comes before this Honorable Court on requests for instructions, certified to this Court by the United States circuit court of appeals for the second department in the following words and figures, now on file with the clerk of this Court:

U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, APRIL —, 1894.

Present: Hon. William J. Wallace and Hon. E. Henry Lacombe, circuit judges holding said court.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff in Error,*
against
BERNARD KEEGAN, *Defendant in Error.*

Request for Instructions.

The defendant in error, who was plaintiff in the circuit court, eastern district of New York, having entered judg-

ment against plaintiff in error for $15,356.38 upon the verdict of a jury, a writ of error was duly sued out, and the cause came on for hearing before the three circuit judges, sitting in court of appeals at a regular term thereof. Thereupon it appeared that Judge Shipman was disqualified, and argument of the writ of error proceeded before the two circuit judges named in the caption hereof. Upon the questions of law arising on such writ of error, the said circuit court of appeals for the second circuit desires the instruction of the Supreme Court of the United States for its proper decision.

Statement of Facts.

The action was brought by Keegan, a brakeman in the employ of the plaintiff, to recover damages for personal injuries received under these circumstances:

Five men, O'Brien, Keegan, Lally, Gooley, and Ward, were on the night of the accident (October 7, 1889), in the service of the Central Railroad of New Jersey, and employed in its yard at Jersey City. They comprised what was called the "night float drill crew," the duty of such crews being to take cars from the tracks on which they had been left by incoming trains and place them on the floats by which they were transported across the North river to the city of New York. The drill crews, like others employed in the same yard, received their general instructions from Dent, the yardmaster; the men composing such crews were hired by Dent and discharged by him.

The course of business was as follows: Dent, the yardmaster, gave to O'Brien drill slips—that is, slips of paper containing the numbers of the cars and the particular tracks leading to the floats on which these cars were to be placed. These float tracks were five in number and were connected by switches with the other tracks in the yard. The execution of this order required frequent switching of cars from one

set of tracks to another, in order to sort out from arriving trains the particular car or cars to be placed on a particular float track. It also required the making up of trains of cars, sometimes longer, sometimes shorter, their movement by the engine attached to them forward or backward and at varying rates of speed, the braking, coupling, and uncoupling of the cars composing them. Ward was engineer; Lally had his post on some car near the engine, in order to transmit to the engineer any signals received; he also helped the engineer with coal and water, and acted as brakeman. Keegan did the coupling, Gooley the uncoupling, and acted as brakeman, while the turning of the switches was attended to by O'Brien. The direction of all these operations was with O'Brien, who is called in the evidence sometimes "foreman driller," sometimes "conductor of the drill crew." He was the one to direct what cars should be taken on by the engine and when; where they should be moved to; when the movement should start and where it should stop; and it was in obedience to his orders that one or other of the men employed in his crew went to one place or another and coupled or uncoupled particular cars. The general management of the operation was with him, and he had control over the persons employed therein.

On the night of the accident Keegan, who had been relighting his lantern at the engine, which was then standing still, attached to several cars, walked to the rear end of the train. O'Brien and Gooley were standing there looking over the drill slip. There were some other cars standing on the same track, about forty feet beyond the end of the cars to which the engine was attached. O'Brien told Gooley what cars were to be uncoupled. He then told Keegan to couple the train onto the cars beyond. Keegan took the coupling link of the rear car in his right hand, and, having signaled for the train to back slowly, walked toward the detached cars, with the rear end of the last car at his back.

Before he reached them he caught his right foot in the guard-rail of a switch, and at once called out to hold up the train. His call was heard and the engine stopped immediately. Gooley, however, had already, on O'Brien's order, drawn the pin and thus uncoupled the cars indicated, so that when the engine pulled up it did not stop their backward movement. Neither Gooley nor O'Brien were on the cars thus moving backward, so there was no one to check their motion by applying the brakes, and as a consequence the rear wheel passed over Keegan's leg, producing the injuries complained of.

There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering these cars to be uncoupled from the train after he had ordered the defendant in error into a position of danger between them and the stationary cars beyond them, and before he had provided them with a person to act as brakeman, and thus exercise control over their movement.

The jury by their verdict found that O'Brien was negligent.

On these facts the judges composing the court differed in opinion, as appears by the following memoranda:

WALLACE, *Circuit Judge*:

Aside from reasons which lead me to regard some of the other assignments of error as meritorious, I think those are well taken which impugn the rulings of the trial judge upon the question whether the defendant was responsible for the negligent acts of O'Brien, foreman, or so-called conductor of the drill crew. The facts seem to me to assimilate the case more closely to that of Railroad Company *vs.* Baugh (149 U. S., 379) than to that of Ross *vs.* Railroad Company (112 U. S., 377).

LACOMBE, *Circuit Judge*:

I feel constrained by the decision in Chicago & Milwaukee R. R. *vs.* Ross, 112 U. S., 394, to vote for affirmance. Although O'Brien was not the conductor of a passenger train running between terminal points and the main line, the evidence shows that he had the general management of this freight-yard train, had command of its movements, and was placed in control over those employed upon it. The starting, the stopping, the movement of the train were subject to his orders, and it was from him that the subordinate employés received directions where to go and what to do. This seems to be, in principle, the case stated at the foot of page 394, in the decision above referred to.

Upon the facts above stated, therefore, this court desires instructions upon questions of law for the proper decision of said cause, namely:

Whether the defendant in error and O'Brien were or were not fellow-servants?

Whether for negligence of O'Brien in failing to place himself at the brake of the backwardly moving cars the plaintiff in error is responsible?

Whether for negligence of O'Brien in directing the backwardly moving cars to be uncoupled and left without a brakeman the plaintiff in error is responsible?

And to that end hereby certifies said questions to the Supreme Court.

Law Points.

I.

That the case of Ross in 112 United States Reports (p. 377) stands as the law today in fact and in law. In that case there was a conductor of a freight train present.

II.

That the case of Baugh, 149 U. S., p. 368, was a case where in fact and in law there was no conductor present.

III.

That the case of Northern Pacific Railroad Company against Hambly, decided May 26th, 1894, on certificate of questions to Supreme Court of the United States.

May be taken as the judicial construction of the relation of the Baugh case to the Ross case.

IV.

That the test of liability of the master for act of servant is given in the Ross case, in Baugh and Hambly cases—Ross case in following words: "The conductor has entire control "and management of the train to which he is assigned. He "directs when it shall start, at what speed it shall run, at "what station it shall stop, and for what length of time, and "everything essential to its successful movements, and all "persons employed on it are subject to his orders (112 U. S., "foot of p. 394)." Baugh case, Judge Brewer cites with approval the following words, the same as above quoted. (149 U. S., p. 381.)

Northern Pacific *vs.* Hambly, Judge Brown characterizes the Ross case and quotes from it as follows: "The case was "decided not to be one of fellow-service upon the ground "that the conductor was (he here adopts the words of the "Ross case) in fact, and should be treated as, the personal "representative of the corporation, for whose negligence it "is responsible to subordinate servants. The court drew a "distinction between servants of a corporation exercising no "supervision over others engaged with them in the same "employment and agents of a corporation clothed with the "control and management of a distinct department, in which "their duty is entirely that of direction and superintend-"ence. In that particular case the court found that the "conductor had entire control and management of the train "to which he was assigned, directed at what time it should

"start, at what speed it should run, at what stations it "should stop, and for what length of time, and everything "essential to its successful movements, and that all persons "employed upon it were subject to its (orders). The word "('orders') referred to the orders of the conductor.

"Under such circumstances he was held not to be a fel- "low-servant with the fireman, brakeman, and engineer, "citing certain cases from Kentucky and Ohio." (154 U. S., p. 359.)

V.

O'Brien was a conductor (p. 3 of Statement), and the proximate cause of plaintiff's injury was his, O'Brien's, negligent order to Gooley to pull the pin (p. 3 of Statement), and it is respectfully submitted that the giving that order was a negligent masterial act in law.

It is respectfully submitted that the questions of law certified to this court herein should be so answered as to permit the court below to affirm the judgment with costs.

A. G. VANDERPOEL,
Attorney and Counsel for Defendant in Error.